

DEC 8 1987

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In The  
**SUPREME COURT OF  
THE UNITED STATES**

October Term, 1987

FREEMAN M. COOPER,

Petitioner,

VS

WILLIAMSON COUNTY BOARD OF EDUCATION, et. al.,

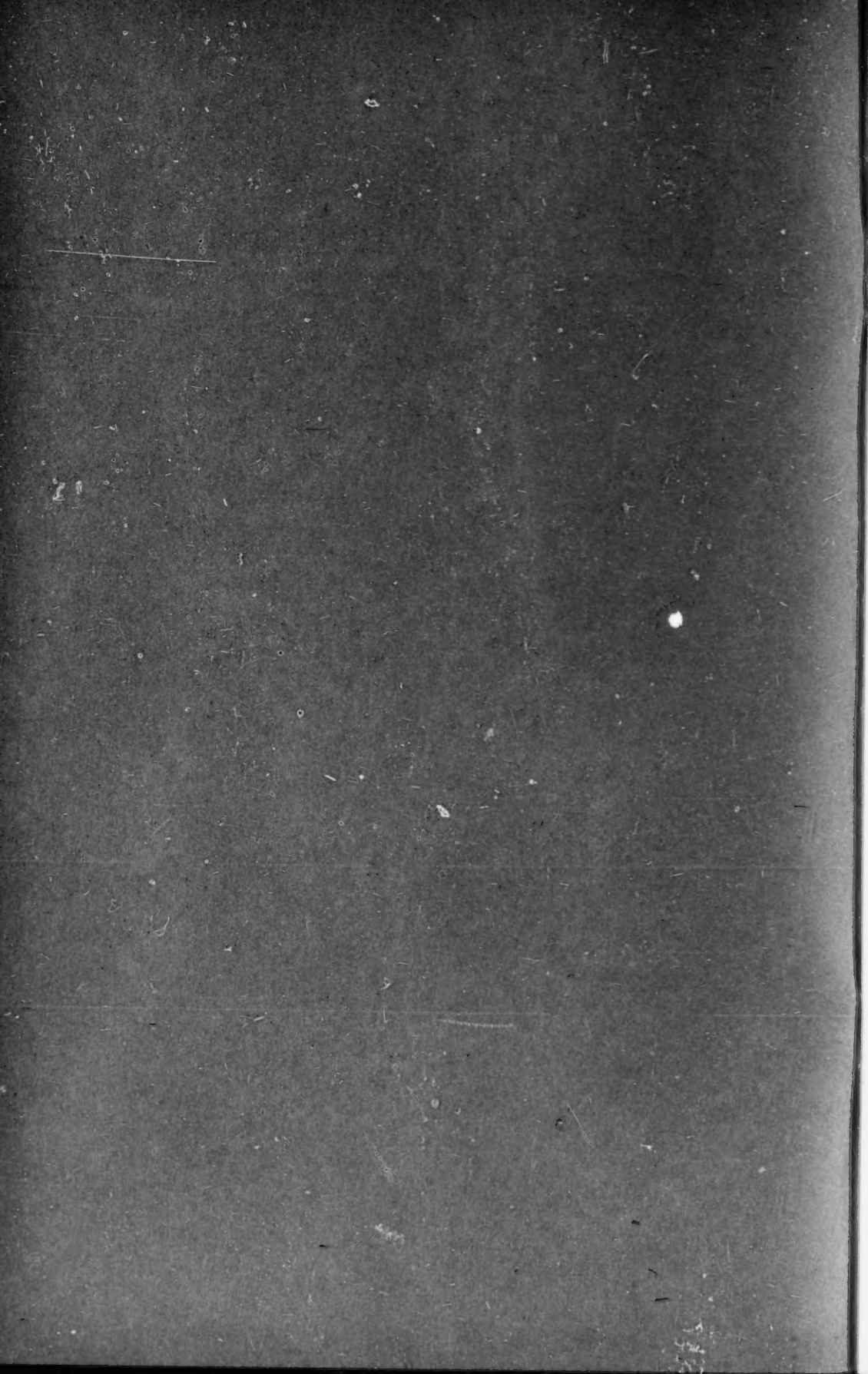
Respondents.

**ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE SIXTH CIRCUIT**

**RESPONDENTS' BRIEF IN OPPOSITION**

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## QUESTIONS PRESENTED FOR REVIEW

1. Whether the district court and Sixth Circuit erred in denying Petitioner's attorneys fees pursuant to Section 706 (k) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000 e-5 (k) for work performed in a hearing pursuant to the Tennessee Teacher Tenure Act after he had won his Title VII Action.
2. Whether or not the lower courts erred in stating that the teacher tenure hearing was not so related to the Title VII Action previously won by the Petitioner as to justify the payment of fees pursuant to 42 U.S.C. § 2000 e-5 (k).
3. Whether or not the lower courts erred in ruling that the work performed by Petitioner's counsel after his appointment to the principalship at Fairview High School for so-called "monitoring" services was not compensable under 42 U.S.C. § 2000 e-5 (k).

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## OPINION BELOW

The Opinion of the Sixth Circuit Court of Appeals is correctly cited in the Petition at 820 F. 2d 180 (6th Cir. 1986), and is correctly set out in the Appendix in the Petition at 1a-11a. The same is not repeated herein.

The order denying the Petition for Rehearing and Suggestion for Rehearing En Banc is also correctly set out in the Petition's Appendix at 12a-13a and is not repeated herein.

The district court's memorandum decision and order denying fees are correctly set out in the Petition's Appendix at 14a-31a and 32a and are not repeated herein.

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## STATEMENT OF THE CASE

The following addition to the statement of facts submitted by the Petitioner is submitted:

1. No request has ever been made by plaintiff's counsel at the district court level for fees for that portion of the proceedings identified as Phase Two in the Petition. The Petition for an Interim Award of Fees filed with the district court and from which this appeal lies plainly states that "The period covered in this petition is from October 1984 to and including April 1, 1985,..."<sup>1</sup> Phase Two pre-dates October 1984.

2. That portion of the Petition identified as Phase Three at pages 6 and 7 is incomplete. The grounds upon which dismissal proceedings were commenced against Petitioner in

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<sup>1</sup>Sixth Circuit Joint Appendix 214

January, 1985, were inefficiency, neglect of duty, insubordination and incompetency.<sup>2</sup> The causes of problems at Fairview High School were due to the Petitioner's refusal to meet the responsibilities of the principalship he fought so hard to attain.<sup>3</sup>

Moreover, on November 21, 1987, defendant Kenneth L. Fleming filed a "Motion for Relief" in the district court seeking permission to file certain charges against Petitioner in accordance with the Tennessee Teacher Tenure Act.<sup>4</sup> Due to his concern that the filing of such charges might be construed to violate the district court's order of June 22, 1984, Mr. Fleming requested permission to produce proof to satisfy the court that the charges were unrelated to the court's previous order and that they dealt strictly with day-to-day operations of the school under state law.<sup>5</sup>

In December 1984, Petitioner responded to Mr. Fleming's motion and asserted that: (1) The district court did not have subject matter jurisdiction over the matter, which was one of purely state law; (2) Mr. Fleming had no standing to file the motion; and (3) the district court should abstain from hearing purely state law claims.<sup>6</sup>

On December 28, 1984, the district court dismissed Mr. Fleming's Motion for Relief, stating that its previous order of June 22, 1984, mandated compliance with applicable state law.<sup>7</sup>

On January 7, 1985, Mr. Fleming formally presented his charges to the school board and a hearing was held pursuant

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<sup>2&3</sup>Sixth Circuit Joint Appendix 94-103

<sup>4&5</sup>Sixth Circuit Joint Appendix 65-68

<sup>6</sup>Sixth Circuit Joint Appendix 69-77

<sup>7</sup>Sixth Circuit Joint Appendix 78-79

to state law, *Tenn. Code. Ann.* § 49-5-511 et seq. State law was followed throughout the administrative proceedings.

3. That portion of the Petition identified as Phase Five (at pages 9 & 10) is incomplete in that the School Board made no findings of fact on any of the charges but simply dismissed them with no elaboration.<sup>8</sup>

4. During the proceedings identified as Phase Six in the Petition, the Petitioner was asking for constructive discharge during a time that he was purportedly out sick but had not formally requested sick leave of the school system.<sup>9</sup>

The Petitioner recognized that the state dismissal hearings were not a part of the Title VII action when he asserted that the court did not have subject matter jurisdiction over the school board proceedings since they were a matter of purely state law. He further conceded that the dismissal charges brought by the Superintendent were not based on the district court's order of June 22, 1984, but rather on the Tennessee Teacher Tenure Act. (See note 6 supra.)

## SUMMARY OF REASONS FOR DENYING THE WRIT

The case of *Pennsylvania v. Delaware Valley Citizens' Council*, 106 S.Ct. 3078 (1986) is distinguishable from the case at bar. The Sixth Circuit had the benefit of the *Delaware Valley Citizens Council*, id., case upon the Petitioner's application for rehearing and suggestion for rehearing en banc. Not one judge of the entire Sixth Circuit requested a vote on the suggestion for rehearing en banc. The original panel con-

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<sup>8</sup>Sixth Circuit Joint Appendix 270

<sup>9</sup>Sixth Circuit Joint Appendix 192



cluded that the issues were fully addressed on original submission of the case.<sup>10</sup> *Delaware Valley* does not destroy a trial judge's statutory discretion in the awarding or denial of attorney's fees in a Title VII case with the factual circumstances as appears in this case.

## REASONS FOR DENYING THE WRIT

### I. CONTRARY TO PETITIONER'S CONTENTION THIS CASE'S RULING FROM THE SIXTH CIRCUIT IS NOT IN CLEAR CONFLICT WITH *PENNSYLVANIA V. DELAWARE VALLEY CITIZENS' COUNCIL*

The statute in question, Section 706 (k) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5 (k) states as follows:

In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs...

It is readily evident from this statute that discretion still exists over the awarding of attorney's fees in this case. *Delaware Valley* acknowledged that discretion when quoting from *Webb v. Board of Education of Dyer County*, 471 U.S., 85 L.Ed. 2d 233, 105 S Ct. 1923 (1985).

There, we noted that for the time spent pursuing optional administrative proceedings properly to be included in the calculation of a

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<sup>10</sup>Pet. App. 12a-13a

reasonable attorney's fee, the work must be "useful and of a type ordinarily necessary" to secure the final result obtained from the litigation. *Id.* at \_\_\_\_\_, 85 L.Ed 2d 233, 105 S Ct 1923. *Application of this standard is left to the discretion of the district court.* *Id.* \_\_\_\_\_, 85 L Ed 2d 233, 105 S Ct 1923. (Cited from *Delaware Valley*, 92 L.Ed 2d 453, 454.) (Emphasis supplied)

Whereas the Court in *Delaware Valley* opined that the work performed by the citizen's committee was "useful and of a type ordinarily necessary to secure the final result," Judge Wiseman was equally correct in denying the sought for fees when the final result in the instant case had already been obtained.

The type of case presented in *Delaware Valley* was much more akin to the relief sought in *Northcross v. Board of Education*, 611 F. 2d 624 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980). In the former the plaintiffs sought to compel the Commonwealth of Pennsylvania to implement a vehicle emission inspection and maintenance program pursuant to the Clean Air Act. 42 U.S.C. 7410. In the latter the plaintiffs sought the desegregation of a school system. In both, wide sweeping changes occurred and extensive work by the plaintiffs attorneys was "useful and necessary" to affect such change.

In this case the Petitioner brought an employment discrimination case in which he prevailed and for which his attorneys were paid. He was given a job as a principal in the Williamson County School System. No long term monitoring process was necessary thereafter to see if he secured his

remedy. And, again, when the school superintendent filed a motion for relief with the district court to proceed according to the state tenure law, the Petitioner's attorneys asserted that the two proceedings, the hearing pursuant the state tenure act and the previously filed Title VII case, were entirely separate; the relief sought by the Superintendent was brought under the state tenure act, not the Title VII relief previously awarded the Petitioner.<sup>11</sup>

Thus, *Delaware Valley* and this case are readily distinguishable. The remedy sought in *Delaware Valley* had not been attained at the time of the disputed work by its attorneys. Petitioner's attorneys had obtained the remedy sought and been paid for their work.

II. THE SIXTH CIRCUIT AND DISTRICT COURT DID NOT ERR IN FINDING THAT THE STATE DIMISSAL HEARING UNDER THE TENNESSEE TEACHER TENURE ACT WAS NOT AN "ACTION OR PROCEEDING" UNDER 42 U.S.C. 2000 E-5 (K)

It is the Respondents' position that *Delaware Valley*, supra., does not overrule *New York Gas-Light Club, Inc. v. Carey*, 447 U.S. 54 (1980). The procedural structure established by Title VII and referred to in the Sixth Circuit's opinion<sup>12</sup> still remains an integral part of Title VII law. The Sixth Circuit was correct in finding that the state proceedings in this case were not referred to the School Board by the district court pursuant to Title VII. The Sixth Circuit expressly held that when the fees at issue were incurred, "No issues remained for resolution in Cooper's Title VII claim." The Petitioner seeks

<sup>11</sup>Sixth Circuit Joint Appendix 73

<sup>12</sup>Pet. App. 5a

to create the misimpression that Judge Wiseman's words "...a fair hearing and give everybody due process" show that the district court deferred a federal question to the school board. The district court later rejected this mischaracterization.<sup>13</sup>

This argument also makes little common sense. Why would a federal judge defer a federal civil rights question to the very body the Judge had ruled had discriminated against the plaintiff?

The Petitioner also mischaracterized the Judge's instructions to Cooper in which the Judge told Cooper to comply with the school system's sick leave policy and to comply with his duty under the Board's mandate to develop a management action plan.<sup>14</sup>

It should be noted here that the district court left avenues open to the Petitioner under the original action, and the Sixth Circuit readily acknowledged his right to come back before the district court in the form of a contempt petition.<sup>15</sup> Petitioner's attorneys chose not to pursue a contempt petition after having taken the Superintendent's deposition.<sup>16</sup>

Thus, under the facts of this case the Sixth Circuit was correct in stating that "the district court did maintain jurisdiction over Cooper's case, but merely as a procedural step to ensure compliance."<sup>17</sup>

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<sup>13</sup>Pet. App. 25a

<sup>14</sup>Sixth Circuit Joint Appendix 212

<sup>15</sup>Pet. App. 6a-7a

<sup>16</sup>Sixth Circuit Joint Appendix 160

<sup>17</sup>Pet. App. 8a

III. UPON CLOSE CONSIDERATION OF THE  
WORK PERFORMED THE DISTRICT COURT  
AND THE COURT OF APPEAL DID NOT ERR  
IN DENYING THE REQUESTED FEES

Generally, the first time frame that the Petitioner seeks fees is from June 22, 1984, the date of the district court's order granting him his remedy, until August 1984, the time at which he was specifically placed as principal of Fairview High School. As stated previously, there has been no request for these fees at the district court level since the petition only pertains to those fees incurred between October 1984 and April 1, 1985. (see note 1 supra.)

The second phase of the fees that are sought by the petitioner pertain to the time after which he was placed as principal of Fairview High School and until the commencement of dismissal proceedings. During that period of time so-called monitoring functions were being performed by Petitioner's attorneys. The district court properly rejected those functions as being unreasonable.<sup>18</sup> The Petitioner's attorneys were not hired to run Fairview High School on a day to day basis and the functions for which they are seeking reimbursement amount to just that. The district court properly rejected those fees and the Sixth Circuit properly affirmed that decision in stating that the remedy for which the Petitioner had first brought his case had long since been awarded.<sup>19</sup> Additionally, the Sixth Circuit properly differentiated *Delaware Valley and Northcross*, supra. in that the work involved in those cases were to insure complicated, long term compliance

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<sup>18</sup>Pet. App. 29a

<sup>19</sup>Pet. App. 7a-8a

with the Clean Air Act, 42 U.S.C. 7694 (d) and a complicated and long term school desegregation plan.

The third and final phase for which the Petitioner's attorneys seek fees for this case are in defending the dismissal charges under the Tennessee Teacher Tenure Act. The Petitioner mischaracterized the nature of the proceedings. Even if the proceedings had resulted in the Petitioner's dismissal, that outcome would not have affected his remedy under his Title VII case, i.e. a principalship and the right to be free from racial discrimination.

The Petitioner's reliance on the fact that his competency, insubordination, inefficiency and neglect of duty was an issue in both the Title VII action and the dismissal proceedings is misplaced. Plaintiffs would have us believe that "competency, inefficiency, insubordination, and neglect of duty" is stagnant and does not change with time or differing circumstances. The dismissal proceedings involved an entirely different creature: Petitioner's competency, inefficiency, insubordination, and neglect of duty *since* the execution of the reinstatement order.

Petitioner's contention that the district court's orders in connection with the state administrative proceedings made the school board hearing a judge-made prerequisite to the Petitioner obtaining further relief in federal court under Title VII is without merit. In denying applicable motions, the district court "resisted attempts by both parties to involve this court in the state proceedings. The court did not make the plaintiff's participation in the state proceedings an integral part of his Title VII remedy, but merely refused to condone or enjoin the initiation of those proceedings."<sup>20</sup>

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<sup>20</sup>Pet. App. 25a

The district court simply did not require the plaintiff to participate in the state court proceedings as a condition precedent to obtaining further relief in federal court.

#### IV. THE CASE HAS NO SIGNIFICANCE BEYOND THE IMMEDIATE FACTS AND PARTIES.

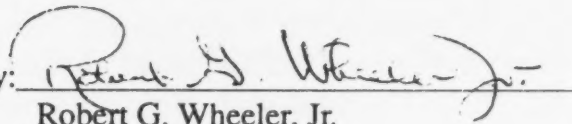
This Court generally seems to extend certiorari jurisdiction only to adjudicating Constitutional issues, questions of national importance, settlement of conflict among the circuits, etc. As the Court has said, certiorari jurisdiction "is a jurisdiction to be exercised sparingly and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision". *Hamilton-Brown Shoe Co. v. Wolfe Bros. & Co.*, 240 U.S. 251, 257-258, 36 S.Ct. 269, 271, 60 L.Ed. 629, 633 (1913). None of these extraordinary matters seem to be present in the case at bar.

Thus, even if the case were wrongly decided below, in granting certiorari, this Court would be performing a mere error-correcting function that would be of no importance except to the litigants themselves. In such a case, the Court considers the granting of a writ to be inappropriate. *Rudolph v. United States*, 370 U.S. 269, 271, 82 S.Ct. 1277, 1278, 8 L.Ed.2d 484, 486 (1962).

## CONCLUSION

For reasons set out herein, the Respondents respectfully urge the Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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